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Supreme Court, U.S.
FILED

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No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

William Dale Trumbly, et ux,
PETITIONER

VS.

Estate of Mrs. Marion R. Lawler, Deceased. et al,
RESPONDENT

On Petition for a Writ of Certiorari
to the
Supreme Court of the State of Texas

PETITION FOR A WRIT OF CERTIORARI

WILLIAM DALE TRUMBLY
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PRO SE PETITIONER

October, 1994

70 pp

QUESTION PRESENTED

Whether the recitation in a judgment stating that a party appeared and was heard, standing in conflict with other evidence that no hearing was actually held, satisfies the Due Process requirements of the Fifth Amendment made applicable to the States by the Fourteenth Amendment to the United States Constitution.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

William Dale Trumbly, et ux, Petitioner

VS.

Estate of Mrs. Marion R. Lawler, Deceased, et al, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

William Dale Trumbly, respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of Texas in this case.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Texas is not reported. The opinion of the Sixth Supreme Judicial

District of the State of Texas is not reported. The opinion of the 62nd Judicial District Court of the State of Texas is not reported.

JURISDICTION

The Supreme Court of the State of Texas entered its judgment on March 9, 1994. The jurisdiction of this Court is invoked under 28 U.S.C.A. 1257(a).

STATUTORY PROVISION INVOLVED

The Fourteenth Amendment to the Constitution of the United States makes applicable to the States the procedural due process guaranteed in the Fifth Amendment to the Constitution of the United

States. Article 1, sec. 19 of the Texas Constitution.

STATEMENT

This is an ex-parte proceeding held on or about July 27, 1992 at the behest of

counsel for one Respondent seeking a new order subsequent to the final judgment entered pursuant to a jury verdict in this case on August 21, 1991, which became final with the issuance of the mandate of the Sixth Judicial District Court of Appeals on June 8, 1992. Though the "Final Order" recites the presence of parties and the taking of testimony, Petitioner was not present nor represented by counsel; and neither the official court reporter's record or the court's docket shows any such hearing. Following this proceeding, the Trial Court reversed its earlier judgment and cancelled the contract of the parties, as well as the money damages, costs and attorney's fees previously awarded to Petitioner.

A. Statement of Factual Background

On or about July 30, 1984, Respondents contracted to sell an historic

home situated in Lamar County, Texas to Petitioner. Petitioner appeared at the title company at the time set for closing with sufficient funds to complete the contract; but Respondents cited a pending suit between themselves and a "missing heir" in refusing to close. Within a week, Respondents had settled these matters in litigation not involving Petitioner; but, nonetheless continued to refuse to close until the contract period had expired. Respondents were still claiming the "missing heir" problem as a defense and as a reason that trial could not be held, until finally, in April, 1990, trial on the merits was held with

verdict for Plaintiff on every issue. The Court held Plaintiff's

proposed judgment "under advisement" until August, 1991, at which

time a judgment drafted by the Hon. Hardy Moore, attorney for a defendant who took

no part in the trial on the merits, was entered by the Court.

B. Proceedings Below

Plaintiff appealed the original judgment which contained numerous vague provisions; but the Sixth Supreme Judicial District Court of Appeals of the State of Texas issued its mandate on June 8, 1992 dismissing this appeal for want of prosecution. No review of the mandate was sought. On or about July 27, 1992, the 62nd District Court entered a new "Final Order" which differs materially from the judgment previously made final. The only pending motion having been abated by Order of the trial court on April 20, 1992, the action of the trial court came as a complete surprise to Petitioner who was not given any opportunity to be heard or contest the "evidence" at a hearing prior to the July 27 order. The Trial Court's

latest pronouncement deprives Petitioner of property rights to damages for breach of contract, state-required attorney's fees, and the costs recovered in the suit on the merits, as well as imposes a contract impossible of performance in order to strip him of his right to specific performance. Petitioner raised the federal issues for the first time in his "Appellant's Brief" to the intermediate court of appeals following this second final judgment. The new judgment of the trial court was affirmed by judgment of the Sixth Supreme Judicial District Court of Appeals on November 2, 1993, which ignored the federal issue by finding that recitationsin the "Final Order" were controlling on the issue of whether a hearing was held. Petitioner requested rehearing on November 15, 1993, with his motion being overruled by the

intermediate appellate court on November 30, 1993. Petitioner then applied for a writ of error, which the Supreme Court of the State of Texas denied with its finding of no reversible error on March 9, 1994, implicitly accepting the finding of the intermediate court of appeals. The actions of the courts below deny both Petitioner and his trial counsel due process of law stemming from an ex parte proceeding.

REASONS FOR GRANTING THE PETITION

Three levels of Texas courts were given the opportunity to address the constitutional issue presented here and refused to do so, to the detriment of Petitioner and to the intent of both the Texas and United States Constitutions. The intermediate appellate court writes that the recitation of appearance and a hearing, as set forth in an unconformed order, alone rebuts the inferences clearly

drawn from the actual trial court record that no hearing was held. The state courts propose that entry of an order with no participation or default by a party or parties is sufficient to deprive that party of due process, so long as the court also keeps the record clear of any evidence to the contrary. The record is devoid of direct proof of the ex parte nature of the final order because Petitioner has been denied the right to appear and be heard subsequent to the fraudulent order. Further, the courts below attempt to override several distinct and separate property rights by narrowing the scope of the jury verdict. Texas law limits only prospective damages when a grant of specific performance is granted. Petitioner's damages for breach of contract, as found at the time of trial, present a separate deprivation of property

issue for the courts. The award of attorney's fees is mandatory if Petitioner prevails in any respect at the trial level, and raises still another separate deprivation of property issue to be resolved by the courts. The holding that a trial judge can supersede these interests with mere recitation in a judgment containing only his signature that due process was followed is an important issue.

I. The Decision of the Supreme Court of Texas is erroneous.

Both the United States Constitution (U.S.C.A. Const. Amend 14 sec. 1) and the Texas Constitution (Vernon's Ann. Texas Const. Art. 1, sec. 19) provide that a person shall not be deprived of life, liberty or property without the due process of law. It is fundamental to the concept of due process that a person has

the right to be heard. Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972). The right to be heard assures a full hearing; the right to introduce evidence at a meaningful time and in a meaningful manner to have judicial findings based upon that evidence. King v. Lindley, 697 S.W.2d 749 (Tex. Ct. App. - Corpus Christi 1985, writ ref. n.r.e.).

Petitioner's due process claim depends upon his having a recognizable property interest which is created and defined by existing rules or understandings that stem from an independent source. Board of Regents v. Roth, 408 U.S. 564, 576-78, 92 S.Ct. 2701, 2708-09, 33 L.Ed.2d 548 (1972). Justice Blackmun writes that this Court has traditionally held that the Due Process Clauses protect civil litigants...as plaintiffs attempting to redress

grievances. Logan v. Zimmerman Brush Co., et al, 455 U.S. 422, 102 S.Ct. 1148, 1154, 71 L.Ed.2d 265 (1982). Petitioner has an even greater expectation of property rights, as his litigation had been reduced to a verdict on his behalf and a judgment in his favor. King, supra, involved a defendant who unilaterally consented to grant specific performance and thereby deprive plaintiff of alternate avenues of redress. The Court held that plaintiff's remedies could not be controlled in such a fashion by the ex parte "consent to judgment" executed by the defendant. In the case before this Court, the courts below adopt a contrary stance and attempt to bind Petitioner to a waiver of those specific rights as allegedly contained in a letter written subsequent to the spurious hearing alleged in this case.

Further, the right to appear and

offer testimony must be timely granted where there is no adequate remedy at law to redress the failure to grant predeprivation hearing. Findeisen v. North East Independent School District, 749 F.2d 234, 238 (Fifth Cir., 1984, rehearing denied 1985, cert denied, 471 U.S. 1125, 105 S.Ct. 2657). As in Findeisen, there are no exigent circumstances in the instant case; and Petitioner has no remedy at law for the termination of his right to demand specific performance of the land sale contract, thereby establishing the necessity of a predeprivation hearing. The Fifth Circuit has found that a postdeprivation hearing will satisfy the Due Process Clauses only in tightly defined circumstances. Equia v. Tompkins, 756 F.2d 1130, 1139 (5th Cir. 1985). None of the exigencies enumerated there has any application to the facts in this case.

Though elaborate proceedings are not required, the opportunity to present reasons why proposed action by the court should not be taken is a fundamental due process requirement and requires notice of the intended action, the reasons supporting such action, and an opportunity to present a contrary side to the proposed action. Schaper v. City of Huntsville, 813 F.2d 709, 714 (5th Cir. 1987. rehearing denied 1987). The record is devoid of any indication of a hearing held between the time legal proceedings were abated on April 20, 1992 and entry of the "Final Order", other than a hearing on June 15, 1992. No testimony was taken at that hearing, nor were any witnessesn present. Counsel merely discussed the fact that the time frame envisioned in the judgment had been tolled on June 8 by issuance of the Appeals Court mandate. No later evidence

appears of record and it is apparent to Petitioner that no hearing was ever held and that the Court simply signed onto the "Final Order" proffered by Mr. Moore. Petitioner learned of the Final Order several days after the fact when a misaddressed copy finally arrived in counsel's office. Petitioner sought rehearing to no avail.

Petitioner's situation is almost identical to the one presented to the Dallas Court of Appeals. In MJR Financing, Inc. v. Marshall, 840 S.W.2d 5, 10 (Tex. Ct. App. - Dallas 1992, no writ), the Court held that the Trial Court abused its discretion by refusing to hear any evidence prior to granting a "death penalty" sanction against Appellant for failure to provide discovery. And, in that case, there had been several earlier hearings regarding the central issue...the

efforts of Appellant to evade discovery. In this case, there has been no evidence on any controlling issue which would justify any part of the Trial Court's "Final Order".

The courts below further denied a property right to recover fees for Petitioner's attorney's services at trial, despite a

statutory provision guaranteeing these fees:

> "A person may recover reasonable attorney's fees from an individual or corporation, in addition to the amount of a valid claim and costs, if the claim is for...(8) an oral or written contract." Civ. Practice and Remedies Code sec. 38.001 (Vernon Supp. 1993).

The present state statute is merely a recodification of the previous Vernon Ann. Civ. Stat. art. 2226 which was repealed in 1985 at the time of recodification. It has been held repeatedly that the statute leaves the court no discretion in awarding

attorney fees to the successful party in "suits founded on oral or written contracts." Okon v. Levy, 612 S.W.2d 938 (Tex. Civ. App. - Dallas 1981, writ ref'd n.r.e.); Davidson v. Suber, 553 S.W.2d 430 (Tex. Civ. App. - Austin 1977, no writ).

Further, under Texas Rule of Court 131, the successful party to a suit shall recover of his adversary all costs incurred therein, except where otherwise provided. Rule 141 gives the court the power to adjudge the costs otherwise if such adjudication is for good cause and the good cause is stated in the record. (emphasis added). Okon, supra.

Since every special issue was answered in favor of the plaintiff/petitioner, it cannot be argued that he is not the "successful party" in this litigation. The Court's original judgment was on the verdict and clearly in

favor of plaintiff. There is no good cause, let alone such cause recited in the judgment, for apportioning costs in any respect. By the Court's direction in its instructions for "Question No. 5" (Court's charge), the "damages" found by the jury were limited to actual, out-of-pocket expenses of plaintiff in securing earlier lawyers and financing to protect his rights in this suit. These "damages" are,in fact, actual costs paid and recompense is necessary to put plaintiff back in the position which he enjoyed prior to defendant/respondent's breach as found by the jury.

Respondent seeks to collaterally attack the verdict and final judgment by means of this ex parte "Final Order". The Trial Court errs in holding Petitioner to a standard ruled unreasonable in Texacally Joint Venture v. King, 719 S.W.2d 652

(Tex. Ct. App. - Austin 1986, writ ref'd n.r.e.). Apparently, the Trial Court has reversed itself on the "successful party" question because Petitioner has not shown ability to obtain financing. It was uncontroverted at the time of trial on the merits that Petitioner had cash in hand to close at the time specified in the contract. Where the vendor has wrongfully refused to perform and vendee has neither the property as collateral nor certainty of prevailing in the legal action, maintaining financing in place pending appeal is impracticable and unreasonable. Id. at 653. Petitioner is entitled to a reasonable time to perform, and would have numerous issues to present to the Court in arguing for additional time. In judging whether Petitioner was entitled to specific performance, as found by the jury and the court in its earlier judgment, the

relevant time for performance was the original time for performance under the contract. Id. Petitioner cannot be held to have "lost" the litigation, after a judgment in his favor, because financing collapsed after an eight-year hiatus while this case was pending.

II. The Question Presented is Important

This Court has addressed the insufficieny of pro forma hearings as recently as its past term in United States v. James Daniel Good Real Property, et al, 114 S.Ct. 492 (1993); but neither this Court nor the Constitution can protect individuals where the State is allowed to rely on an Order which binds a party who has not approved of the form or substance of findings contained therein. A judge need only sign an Order and then refuse to entertain any additional hearings in order

to completely strip a litigant of all his constitutional rights. Unless a predeprivation hearing is ordered in this case, Petitioner will lose forever his expected right to specific performance of the sales contract; and, clearly that entitles him to such a hearing even if this Court finds that the loss of other property rights can be adequately addressed by a postdeprivation suit for damages.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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October Term, 1994

APPENDIX

Judgment Nunc Pro Tunc, 62nd Judicial District, Lamar County, Texas (8/21/91)..... 3a

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Date Stamped Aug 21, 1991

No. 50,968

WILLIAM DALE TRUMBLY, ET UX	)	IN THE DISTRICT
	)	COURT
VS .	)	OF LAMAR COUNTY, TEXAS
	)	
ESTATE OF MRS. MARION R. LAWLER, DECEASED, ET AL	)	62ND JUDRCIAL DISTRICT

JUDGMENT NUNC PRO TUNC

On April 10, 1990, come on to be heard the above-entitled and numbered cause, wherein the plaintiffs are William Dale Trumbly and wife, Vicky Belinda Wood, and the defendants are Marion R. Lawler, Jr., individually and as independent executor of the estates of Marion R. Lawler, Sr., Mildred Fielding Lawler, and Margaret Mary Dupree, and trustee under the will of Marion R. Lawler, Sr., John F. Lawler, Mildred L. Brown, Rosemary L. Jordan, William Burge, individually and as independent executor of the estate of Mary Burge Fielding, Otis C. Burge, Rowena White Marre, and Frances B. Ward.

All parties appeared in person or by their attorneys and announced ready for trial; and a jury having been demanded, a jury of twelve good and lawful jurors of Lamar County, Texas was duly impaneled and sworn to try the issues between the parties.

The taking of testimony and the introduction of witnesses commenced and continued until concluded on the 17th day of April, 1990 when the Court's charge was submitted to the jury, arguments of counsel were made, the jury retired in charge of an officer of the court to consider of their verdict, and on ssid 17th day of April returned into open court their verdict,

officer of the court to consider of their verdict, and on ssid 17th day of April returned into open court their verdict, signed by the foreman, Kenneth Bush, which was received and ordered filed, readlng as follows;

Questlon No. 1
Do you find from a preponderance of the evidence that the contract was still ln existence on November 21, 1984?
Answer: Yes

Question No. 2
Do you find from a preponderance of the evidence that seller failed to cure objections in the title within a reasonable time after the missing heir question was raised by the title insurance compsny?
Answer: Yes

Question No. 3
Do you find from a preponderance of the evidence that such failure to cure the title was a failure to perform the contract by sellers?
Answer: Yes

Question No. 4
Do you find that at this time the buyer is ready, willing and able to pay the agreed consideration and periorm the contract?
Answer: Yes

Question No. 5
What amount, if any, do you find from a preponderance of the evidence to be the acutual 1088 in dollars and cents to buyer for sellers failure to perform?
Answer: $15,000.00

Question No. 6
What sum of money, if any, do you find to-be a reasonable attorney fee incurred by buyer for the prosecution of this case?

Answer: $15,000.00

Thereafter the plaintiffs filed a Motion for Judgment on the verdict, contested by the defendants, and the matter w~s taken under advisement by the Court until the date of signing of this judgment; and it now appearing to the Court that judgment should be rendered as set out below it i8 therefore ORDERED, ADJUDGED and DECREED as follows:

1: THAT in accordance with the further terms and provisions hereof the plaintiffs shall have, and are hereby awarded specific performance of the parties' contrsct for sale by defendants and purchAse by the plaintlrfs of the real property and improvements thereon at 418 West Washington Street, Paris, Lamar County, Texas, a of the Larkin Rattan Survey, described by metes and bounds as follows:

BEGINNING st the intersection of the NB Line of West Washington Street with the WB Line of 4th Street SW, formorly Travis Street;

THENCE NORTH with the WB Line of 4th Street SW 273 feet, a stake;

THENCE WEST 488 feet, a stake in the EB Line of 5th Street SW, formerly Baker Street;

THENCE SOUTH with the EB Line of 5th Street SW 273 feet, a stake at its intersection with the NB Line of West Washington Street;

THENCE EAST with the NB Line of West Washington Street 488 feet to the place of beginning.

2. THAT Myra Nell Wilson, a suitable, proper and disinterested citizen of Lamar County, Texas be and is hereby appointed

Special Commissioner to convey the above described real property and premises to plaintiffs for and on behalf of the defendants, by deed with covenants of general warranty; to act and serve as such on taking oath of office and furnishing bond in the sum of One Thousand (1,000.00) Dollars, to be approved by the Judge of this Court.

3. THAT within thirty (30) days from this date the Special Commissioner shall mail to plaintiffs at their last known address, or to their attorney of record, David Holmes, an Owner Title Insurance Policy Commitment for the issuance to plaintiffs at "Closing" of an Owner Title Insurance Policy, Texas Standard Form, in~uring the title for the full purchase price, subJect to ~ny lien securing payment to B third-party lender of the amount advanced to finance the plaintiffs' purchase of the property, ad valorem taxes for the year 1991 (to be pro-rated to date of Closing), and easements and restrictions Or record.

4. THAT conditioned on the ~urnishing o~ a Tltle Policy Commitment in keeping with Paragraph 3, above, "Closing" shall be at 1:30 p.m. on the 30th day of September, 1991, unless appealed, in which event the time allowed shall be forty-days after final judgment, at the office of Stone Title Company in Paris, Texas; concurrently therewith the plaintiffs paying the sum of Eighty Thousand (S80,000) Dollars, in cash, to the Special Commissioner, who shall pay the Title Company its premium, incidental expenses, unpaid taxes for prior years and the pro rata of 1991 taxes; said sum of Eighty Thousand ($80,000.00) Dollars giving plaintiffs credit for their actual damages, $15,000.00, the contract price being $95,000.00; who shall take said property in its "as is" condition.

5. Upon receipt of the proceeds of sale (less the deductions specified in

Paragraph 4, above) that money shall be by the Special Commissioner disbursed and distributed as follows:

a) A real estate broker's commission of six (6) percent of the gross sale price, $5700.00, to Sue McDonald (S2280.00) and Century 21 Executive Realty ($3420.00);

b) The sum of $750.00 to herself for services as Special Commissioner;

c) The sum of $15,000.00 to David Holmes, attorney of record for the plaintiffs, in satisfaction of the attorney's fee award to the plaintiffs;

d) All court costs; snd

e) The balance to the defendants in the following proportions:

Five-sixths (5/6ths), jointly, to the defendants other than William T. Burge, Otis C. Burge, Rowena White Marre and Frances B. Ward; and

One-sixth (1/6th) to William T. Burge, Executor, Estate of Mary Burge Fielding.

The foregoing notwithstanding, if plaintiffs do not pay said sum of Eighty Thousand (S80,000.00) Dollsrs as aforesaid, in cash or bankable funds, at the office of Stone Title Company in Paris, Texas, by 1:30 p.m. on Monday, the 30th day of September, 1991, unless appealed, in which event the time allowed shall be forty days after final judgment, time being of the essence, then and in that event, their failure to do 80 shall be by the Special Commissioner reported in writing to this Court, and upon hearing thereof, after five (5) day~ notice to the parties or their attorneys of record under

Rule 21a, Texas Rules of Civil Procedure, judgment may be rendered denying the plaintiffs specific performance, cancelling the abovementioned contract of sale, and denying a recovery of said damages of S30,000.00; discharging defendants with their costs. Conversely, should plaintiffs timely pay sum of Eighty Thousand (S80,000.00) the Special Commissioner shall in writing report that fact to the Court. In either event the Special Commissioner will forthwith be discharged from her trust. IT is finally ORDERED that jurisdiction of the instant case is retained in order to make such further orders therein as may by the Court hereafter be considered necessary, proper or advissble (until discharge of the Special Commissioner).

All relief not by this ~udgment expressly awarded every party, denied.

It is so ORDERED, and this judgment is signed on this 21 day of August, 1991.

{SIGNED Jim N. Thompson)
JUDGE, DISTRICT COURT,
LAMAR COUNTY,
62ND JUDICIAL DISTRICT OF TEXAS

APPROVED AS TO FORM:

DAVID W. HOLMES,
ATTORNEY FOR PLAINTIFFS

RUSSELL ORMESHER,
ATTORNEY FOR DEFENDANT

HARDY MOORE,
ATTORNEY FOR DEFENDANT

No. 50,968

WILLIAM DALE TRUMBLY, ET UX of	) IN THE DISTRICT COURT
VS.	) LAMAR COUNTY, TEXAS
ESTATE OF MRS. MARION R. LAWLER, DECEASED, ET AL	) 62ND JUDICIAL DISTRICT

MOTION TO SET ASIDE JUDGMENT

TO THE HONERABLE JIM NOBLE THOMPSON, JUDGE OF SAID COURT:

COMES NOW, William Dale Trumbly and respectfully moves the Court to set aside its judgment and enter a revised or new judgment in the above-entitled and numbered cause, and in support of this motion would show:

I.

Nunc Pro Tunc judgment was signed in this case on the 21st day of August, 1991. The Court followed the letter of the jury's werdict and judgment was chiefly in favor of Plaintiffs, William Dale Trumbly and wife, and against defendants.

II.

The court's judgment, however, went byond the jury's verdict and imposed significant new limitations on Plaintiff's rights and recovery. The judgment redefined Plaintiff's performance of the contract which was the basis of the lawsuit to include only the purchase of the property, whereas the contract on its face would excuse Planitiff from an obligation to purchase in teh event financing could not be obtained.

III.

The Court's judgment further conditions Plaintiff's recovery of mony damages and attorny's fees and costs for Defendants' breach after Plaintiff had fully performed his obligations under the contract upon Plaintiff again performing the contract as rewritten by the Court. Plaintiff believes the Court placed such condition on teh judgment to be equitable toDefendants; but urges that the Court is erroneously forcing Plaintiff to an election of remedies at trial has already severely devalued Plaintiff's recovery through loss of tort damages and that Defendants are not entitled to this later windfall from the Court in event that financing cannot be obtained.

IV.

The Ciurt, in its judgment, has further materially altered the terms of the contract to be performed by apparently requiring Plaintiff to accept the property in its present condition. Plaintiff contends that the property must be in the original condition contracted for at the time of execution of teh contract. Plaintiff cannot have arms length negotation on this matter because he has been and still is barred from going on the property by judicial order. It is apparent, however, from just an external view that the property has not been kept up since the time of trial of this matter, and Defendants may have in fact abandoned it in anticipation that the Court would follow the jury verdict and permit Plaintiff to purchase the house. Nonetheless, the Court's judgment has placed the burden for risk of loss on the buyer while the seller has had sole possession and has, in fact, legally prohibited Plaintiff from attempting to protect and preserve the property.

V.

Plaintiff has had to retain the services of the undersigned attorney to present this Motion and represent him in prosecuting a possible appeal from the Court's order on this motion. He has agreed to pay a reasonable attorney's fee for these services, and should he prevail on appeal, Defendants should be ordered to pay such additional attorney's fees and costs as to be shown upon hearing of this motion.

WHEREFORE, Plaintiff prays that the Court will set aside its judgment of August 21, 1991 and enter a modified judgment which properly apportions the risk of loss or damage to the property occurring after the time of execution of the contract; seperates its award of damages, costs and fees from specific performance to reflect the conditions under which the Court ordered Plaintiff to proceed in presenting his case at trial; and clarifying its judgment to broaden the means of Plaintiff's "specific performance" to include all options given Plaintiff in the origional contract. Plaintiff further prays to recover his costs and attorney's fees incurred in connection with this motion and any subsequent appeal from the Court's orders following hearing of this motion.

Respectfully submitted,

{Signed

David W. Homes}

David

W. Homes

ATTORNEY FOR PLAINTIFF

State

Bar Number 09907300

P.O.

Box 37

Paris,

Texas 75460-0037

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Motion to Set Aside Judgment was mailed to all counsel of record on the 19th day of September, 1991

{Signed David W. Homes}
DAVID W. HOMES

In The
Court of Appeals
Sixth District of Texas at Texarkana

No. 6-91-118-CV

WILLIAM DALE TRUMBLY AND WIFE,
VICKY BELINDA WOOD, Appellants

V.

MARION R. LAWLER, JR. INDIVIDUALLY AND AS INDEPENDENT EXECUTOR OF THE ESTATE OF MARION R. LAWLER, SR., DECEASED, ET AL, Appellees

---

On Appeal from the 62nd Judicial
Distric Court Lamar County, Texas
Trial Court No. 50968

Before Cornelius , C.J. Bleil and Grant, JJ.
Opinion by Justice Bleil

OPINION

This is an appeal from a nunc pro tunc judgment entered on August 21, 1991. The record was due on December 19, 1991. The transcript was timely filed, but no statement of fracts or brief has been recieved.

The time for filing a motion for extension of time to file a statement of facts expired on January 3, 1992. We could not accept and file a statement of facts after that date. TEX. R. APP. P. 54(c). On January 14, 1992, we granted a second motion for extension of time to file a brief to

February 13, 1992, and a third motion for extension of time to file a brief to March 4, 1992. No brief or motion for an additional extension of time has been filed.

This appeal is dismissed for want of prosecution.

{signed}
Charles Bliel
Justice

April 22, 1992
Filed April 22, 1992

Do Not Publish

THE STATE OF TEXAS

TO THE 62ND JUDICIAL DISTRICT COURT OF LAMAR COUNTY, GREETINGS:

Before the Court of Appeals for the Sixth Court of Appeals District of Texas, on the 22nd day of April, A.D. 1992, the cause upon appeal to revise or reverse your Judgment was determined; and therein our said Court made its order in these words:

William Dale Trumbly and Wife, Vicky Belinda Wood, Appellants

No. 6-91-118-CV v.

Marion R. Lawler, Jr., Individually and As Independent Executor of the Estate of Marion R. Lawler, Sr., Deceased, Et Al, Appellees

BE IT REMEMBERED, that in the above styled and numbered cause, in accordance with the Court's opinion of this date, the Court finds that the appellants have failed to file their brief within the time allowed. Therefore, it is ORDERED that the appeal herein be, and hereby is, DISMISSED for want of prosecution.

It is further ORDERED that the appellants William Dale Trumbly and Wife, Vicky Belinda Wood, and their surety, David W. Holmes, jointly and severally, pay all costs incurred by reason of this appeal.

WHEREFORE, WE COMMAND YOU to observe the order of our said Court in this behalf, and in all things to have it duly recognized, obeyed and executed.

WITNESS, the Hon. William J. Cornelius, Chief Justice of our said Court of Appeals, with the seal thereof annexed, at the City of Texarkana, this the 8th day of June A.D.

1992.

TIBBY THOMAS, Clerk

By:{Signed Lynda Poore}

Deputy

IN THE DISTRICT COURT OF LAMAR COUNTY
62ND JUDICIAL DISTRICT OF TEXAS

WILLIAM DALE TRUMBLY ET UX., Plaintiffs,	)	No. 50,968
Vs.	)	REPORT OF MYRA NELL WILSON SPECIAL COMMISSIONER
ESTATE OF MRS. MARION R. LAWLER, DECEASED, ET AL., Defendants.	)	

TO THE HONORABLE JIM N. THOMPSON, DISTRICT JUDGE:

Comes MYRA NELL WILSON, appointed Special Commissioner to execute the deed in behalf of the defendants in the above entitled and numbered cause, the plaintiffs, William Dale Trumbly and wife, Vicky Belinda Wood, having been awarded a decree of specific performance of a contract to purchase property on West Washington in Paris, Lamar County, Texas, described a follows, conditioned on their paying therefor the sume of eighty thousand ($80,000.00) and no/100 dollars by September 30, 1991, the title having been found insurable:

> BEGINNING at the intersection of the NB line of West Washington Street with the WB line of 4th Street SW, formerly Travis Street;
>
> THENCE NORTH with the WB line of 4th Street SW 273 feet, a stake;
>
> THENCE WEST 488 feet, a stake in the EB line of 5th Street SW, formerly Baker Street;

THENCE SOUTH with the EB line of 5th Street SW 273 feet, a stake at its intersection with the NB line of West Washington Street;

THENCE EAST with the NB line of West Washington Street, 488 feet to the place of beginning.

The defendants having not complied with the terms and conditions of the aforementioned decree in that they have not paid the purchase price of Eighty-Thousand ($80,000.00) Dollars for the above described property or otherwise tendered performance; and your Special Commissioner accordingly asks the Court to enter an order at this time finding and decreeing that the plaintiffs, William Dale Trumbly and wife, Vicky Belinda Wood, have not complied with the requirements of said decree of specific performance, and in consequence that the above referred to contract is no longer of any force or effect, discharging the Special Commissioner and relieving her of her duties, and concelling her bond as Special Commissioner.

WHEREFORE, Myra Nell Wilson, Special Commissioner, prays that the contract of sale and purchase entered into by the parties to the above entitled and numbered suit and cause of action be found to be on no further force or effect, and that she be discharged as Special Commissioner and her bond as such cancelled; and she prays for general relief.

{signed}
Myra Nell Wilson
Special Commissioner

SUBSCRIBED and SWORN to before me by MYRA NELL WILSON on this 26th day of March, 1992.

{notary stamp} {signed Elfie Roberts}
Notary Public, State of Texas

{Comm. Exp. 7-9-94}

Set for hearing on Monday the 6th day of April, 1992, at 1:30 p. m., in the District Court Room of the Larmar County Court House in Paris, Texas; notice to issue to all parties by Certified Mail addressed to their attornerys of record.

Signed this 26 day of March, 1992.

{signed T. L. Braswell}
Judge, District Court,
Lamar County 62nd
Judicial District
of Texas

Copies have been mailed to the following by Certified Mail:

David W. Homes, Esq.
P. O. Box 37
1705 East Houston,
Suite 103
Paris, Texas 75460

Brady Fisher, Esq.
Old American Legion Building
NE 2nd Street At Houston
Paris, Texas 75460
Pttorneys of
Dallas, TX 75201

Pat W. Davis, Esq..
4817-B Rowlett Road
Rowlett, Texas 75088

Mr. J. Russell Ormesher
Horton Ormesher & Elliston
2000 Allianz Financial Center
2323 Bryan Street, LB 130
Dallas, Texas 75201-2630; and

Mr. Hardy Moore

Moore Payne & Clem
310 First National
Bank Building
Paris, TX 75460
Attorneys for defendents.

This 26th day of April, 1992

{signed}
Myra Nell Wilson

IN THE DISTRICT COURT OF LAMAR COUNTY
62ND JUDICIAL DISTRICT OF TEXAS

WILLIAM DALE TRUMBLY ET UX., Plaintiffs,	)	No. 50,968
Vs.	)	ORDER OF ABATEMENT
ESTATE OF MRS. MARION R. LAWLER, DECEASED, ET AL., Defendants.	)	

On the date of signing herof, it appearing that the Special Commissioner's Report was prematurely filed, it is ORDERED that it be and is hereby abated until a determination of the pending appeal to the Court of Appeal's at Texarkana, Sixth District.

Date: April 20, 1992

{signed}
Judge, District Court,
Lamar County 62nd
Judicial District
of Texas

Approved for Entry:

{signed David Homes}
Attorney for Plaintiffs

{signed Hardy Moore}
Attorney for Defendants
Burge et al.

THE STATE OF TEXAS

TO THE 62ND JUDICIAL DISTRICT COURT OF 1 AMAR COUNTY, GREETINGS:

Betore the Court of Appeals for the Sixth Court of Appeals District of Texas. on the 22nd day of April A.D. 1992, the cause upon appeal to revise or reverse your Judgment was determined; and therein our said Court made its order in these words:

William Dale Trumbly, Appellant

No. 06-92-118-CV v.

Estate of Mrs. Marion R. Lawler, Deceased, Et Al, Appellees

BE IT REMEMBERED, that in the above styled and numbered cause, in accordance with the Court's opinion of this date, the Court finds that there was no error in the judgment below. Therefore, it is ORDERED that the judgment of the court below is in all things AFFIRMED.

It is further ORDERED that the appellant, William Dale Trumbly, and his surety, David W. Holmes, jointly and severally, pay all costs incurred by reason of this appeal.

WHEREFORE, WE COMMAND YOU to observe the order of our said Court in this behalf and in all things to have it duly recognized obeyed and executed WITNESS, the Hon. William J. Cornelius, Chief Justice of our said Court of Appeals, with the seal thereof annexed, at the City of Texarkana, this the 8th day of June A.D 1992.

TIBBY THOMAS, Clerk

By:{Signed Lynda Poore}

Deputy

{Stamped '92 JUL 27
FILED FOR RECORD
LAMAR COUNTY TEXAS}

IN THE DlSTRlCT COURT Of LAMAR C0UNTY
62ND JUDICIAL DlSTRICT 0F TEXAS

WILLIAM DALE TRULBLY, ET UX.,	)	
PLAINTIFFS,	)	NO. 50,968
ESTATE 0F MRS. MARI0N R LAWLER, DECEASED, ET AL.,	)	FINAL 0RDER
DEFENDANTS.	)	

0N THIS 27th DAY OF July, 1992, CAME RCGULARY ON TO BE HEARD IN THE ABOVE ENTITIED AND NUMBERED CAUSE INVOEVING A CONTRACT FOR SAEE AND PURCHASE OF THE FOILOWING DESCRIBED REAL PROPERTY AND PREMISES, THE REPORT OF MYRA NELL WILSON, SPECIAL COMMISSIONER:

BEGINNING AT THE INTSRSECTION OF THE NB LINE OF WEST WASHINGTON STREET WITH THE WB LINE OF 4TH STREET SW, FORMERLY TRAVIS STREET;

THENCE N0RTH WITH THE WB LINE OF 4TH STREET SW 273 FEET, A STAKE;

THENCE WEST 488 FEET, A STAKE IN THE EB LINE OF 5TH STREET SW, FORMERIY BAKER STREET;

THENCE S0UTH WITH THE EB LINE OF 5TH STREET SW 273 FEET, A STAKE AT ITS INTERSECTION WITH THE NB LINE OF WEST WASHINGTON STREET;

THENCE EAST WITH THE NB IINE OF WEST

WASHINGTON STREET, 488 FEET TO THE PEACE OF BEGINNING.

ALL PARTIES BEING PRESENT OR REPRESENTED BY COUNSEL, THE COURT PROCEEDED TO HEAR AND CONSIDER THE TESTIMONY AND EVIDENCE IN SUPPORT OF AND AGAINST SAID REPORT OF THE SPECIAL COMMISSlONER; AND

IT APPEARING TO THE COURT THAT THE PLAINTIFFS, WILLIAM DALE TRUMBLY AND WIFE, VICKY BELINDA WOOD, HAVE DEFAULTED IN THE PERFORMANCE OF THEIR OBLIGATION AND AGREEMENT TO PURCHASE THE ABOVE DESCRIBED PROPERTY AND BY REASON THEREOF THE CONTRACT ENTERED INTO BY AND BETWEEN THE PARTIES FOR ITS SALE TO AND PURCHASE BY WILLAM DALE TRUMBLY AND WIFE, VICKY BELINDA WOOD, IS OF NO FURTHER FORCE OR EFFECT AND SHOULD BE CANCELLED;

IT IS, THEREFORE, 0RDERED, ADJUDGED AND DECREED BY THE COURT THAT THE AFOREMENTIONED CONTRACT OF SALE AND PURCHASE IS NO LONGER OF ANY FORCE OR EFFECT AND THAT IT SHOULD BE, AND IS HEREBY, CANCELLED AND HELD FOR NAUGHT.

ALL COSTS INCURRED BY THE PLAINTIFFS ARE HEREBY TAXED AGAINST THEM, AND ALL OTHER COSTS IN THE CASE ARE TAXED AGAINST THE ESTATE OF MRS MARION R. LAWLER, DECEASED.

ALL RELIEF SOUGHT BY ANY PARTY HERETO AND NOT HEREBY AWARDED IS HEREBY DENIED.

DATED THIS 27th DAY OF JULY 1992.

{Signed Jim N. Thompson}
JUDGE PRESIDING

No. 50,968

WILLIAM DALE TRUMBLY, ET UX	)	IN THE DISTRICT COURT
	)	OF LAMAR COUNTY, TEXAS
VS.	)	
	)	
ESTATE OF MRS. MARION R. LAWLER, DECEASED, ET AL	)	62ND JUDICIAL DISTRICT

MOTION TO SET ASIDE FINAL ORDER

TO THE HONORABLE JUDGE JIM N. THOMPSON:

{overstrike Aug with July}
On August 27, 1992, Defendants obtained an ex-parte "Final Order" which, is in fact and effect, a substituted judgment n.o.v. in the above-referenced matter, contrary to terms of this Court's prior judgment which reads in relevant part:

The foregoing notwithstanding, if plaintiffs do not pay said sum of Eighty Thousand ($80,000.00) Dollars as aforesaid, in cash or bankable funds, at the office of Stone Title Company in Paris, Texas, by 1:30 p.m. on Monday, the 30th day of September, 1991, unless appealed, in which event the time allowed shall be forty days after final judgment, time being of the essence, then and in that event, their failure to do so shall be by the Special Commissioner reported in writing to this Court, and upon hearing thereof, after five (5) days notice to the parties or their attorneys of record under Rule 21a, Texas Rules of Civil Procedure, judgment may be rendered denying the plaintiffs specific performance, cancelling the abovementioned contract of sale, and denying a recovery of said damages of S30,000.00; discharging defendants with their costs.

Conversely, should plaintiffs timely pay sum of Eighty Thousand ($80,000.00) the Special Commissioner shall in writing report that fact to the Court. In either event the Special Commissioner will forthwith be discharged from her trust.

I.

Plaintiffs were never informed of any hearing, or indeed of motion, seeking the relief granted to Defendant. Defendant has, in fact, repeated the action found unlawful by the jury and the Court in the principal case by unilaterally breaching the contract.

II.

The Court's ex-parte order is violative of the terms of the contract; denies Plaintiff due process of law; and, unconstitutionally confiscates property belonging to Plaintiff which is in the hands of Defendant.

III.

Plaintiff's delay in responding to the Court's ex-parte order was caused solely by the actions of Defendant in mailing notice of that action to an address not used by Plaintiff's counsel in nearly five years. Defendant has previously addressed correspondence and papers to Plaintiff's current address and was aware of that address, which has not changed within the past five years. Defendant did not attempt notification of Plaintiff concerning the signing of this order until September 6, 1992.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that the Court set aside the ex-parte order rendered on July 27, 1992.

Respectfully submitted,
{Signed David W. Homes}
David W. Holmes
ATTORNEY FOR PLAINTIFF
SBN 09907300
P.O. Box 37
Paris, Texas 75461-0037
(903) 784-7942

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Motion to Set Aside was mailed to Movant't attorney, Hardy Moore, Esq., 300 National Bank Bldg., Paris, Texas 75460 on teh 7th day of August, 1992.

{Signed David W. Homes}

No: 50,968

WILLIAM DALE TRUMBLY, ET UX	)	IN THE DISTRICT COURT
VS .	)	OF LAMAR COUNTY, TEXAS
ESTATE OF MRS. MARION R. LAWLER, DECEASED, ET AL	)	6 2 N D JUDICIAL DISTRICT

MOTION TO SET ASIDE FINAL ORDER

The Court, having considered the motion of Plaintiff to set aside its Order of July 27, 1992 is of the opinion that such Motion should be:

DENIED, to which action of the Court Plaintiff is given his exception;

GRANTED, and the exparte Order i8 hereby set aside; or

SET FOR HEARING before this Court on the _____day of August, 1992 at _____o'clock .M. in the District Courtroom of the Lamar County Courthouse, Paris, Texas.

Signed this_____day of August, 1992.

(Not Signed)
JUDGE PRESIDING

In The
Court of Appeals
Sixth District of Texas at Texarkana

No. 06-92-00125-CV

WILLIAM DALE TRUMBLY, Appellant

V.

ESTATE OF MRS. MARION R. LAWLER, DECEASED, ET AL, Appellees

On Appeal from the 62nd Judicial District Court
Lamar County, Texas
Trial Court No. 50968

Before Cornelius, C.J., Bleil and Grant, JJ.
Opinion by Chief Justice Cornelius

OPINlON

William Dale Trumbly and wife appeal from a final judgment rescinding an interlocutory judgment for specific performance of a contract to sell real property. Trumbly contends he was not given notice or an opportunity to be heard concerning the final judgment, and that the final judgment is erroneous because it cancels the real estate sales contract instead of enforcing it and because it depnves him of costs awarded in the interlocutory judgment. We overrule these contentions and affirm the judgment.

Trumbly and others brought suit for specific performance of a contract of sale whereby he was to purchase a house and lot in Lamar County. Based on a jury verdict, the district court rendered judgment on August 21, 1991, ordering specific performance of the contract against the sellers and awarding Trumbly $15,000.00 damages and $15,000.00 attorney's fees.' It further awarded Trumbly credit for the S15,000.00 damages, thus reducing the amount of money he was required to pay for the land from $95,000.00 to $80,000.00. The judgment also contained the following provision:

> [1]The foregoing notwithstanding, if plaintiffs do not pay said sum of Eighty Thousand ($80,000.00) Dollars

---

[1]The judgement is incorrectly styled a nunc pro tunc judgment. A nunc pro tunc judgment is a correction of a clearical mistake in the record of a judgment after the court's plenary power over the judgment has expired. Tex. R. Civ. P. 306a(6), 316.

> as aforesaid, in cash or bankable funds, at the office of Stone Title Company in Paris, Texas, by 1:30 p.m. on Monday, the 30th day of September, 1991, unless appealed, in which event the time allowed shall be forty days after final judgment, time being of the essence, then and in that event, their failure to do so shall be by the Special Commissioner reported nt in writing to this Court, and upon hearing thereof, after five (5) days notice to the parties or their attomeys of record under Rule 21a, Texas Rules of Civil Procedure, judgment may be rendered denying the plaintiffs specific performance, cancelling the aforementioned contract of sale, and denying a recovery of said damages of $30,000.00; discharging defendants with their costs. Conversely, should plaintiffs timely pay sum of Eighty Thousand ($80,000.00) the Special Commissioner shall in writing report that fact to the Court. In either event the Special Commissioner will forthwith be discharged from her trust.

The judgment also states that jurisdiction is retained until the special commissioner is discharged, "in order to make such further orders . . . as may by the Court hereafter be considered necessary, proper or advisable." Thus, the judgment of August 21, 1991 was interlocutory. *See Wilcox v. St. Mary's University of San Antonio, Inc.*, 501 S.W.2d 875, 876 (Tex. 1973); *Campbell v. Campbell*, 550 S .W.2d 164, 166 (Tex. Civ. App.s-Austin 1977, no writ); 5R. McDONALD, TEXAS CIVIL PRACTICE % 27:4, at 10 (rev.1992).

The final judgment, or "final order" as

the district court styled it, recieed that a hearing was at which evidence was taken and held on the report of the special commissioner, at which all parties were present or represented by counsel. It further recites that the trumblys had defaulted in teh preformance of their obligation to purchase the property and, because of that default, the contract of sale was cancelled and voided. The order further taxed all costs incurred by the Trumblys against them.

Trumbly argues that the final order was the result of an ex parte hearing of which he dad no notice, which he did not attend, and of which no record exists. He contends that the trial court's failure to give notice of the hearing deprived him of property without due process, in violation of U.S. Const. amend. XIV and Tex. Const. art. I, %19.

The final order states, "*All parties being present or represented by counsel,* the court proceeded to hear and consider the testimony and evidence" (emphasis added). Recitals in a judgment import the highest evidence of verity and are generally taken as true unless there is something in the record to contradict them. 5 Tex. Jur. 3d *Appellate Review* % 697 (1980); *see MJR Financing, Inc. v. Marshall,* 840 S.W.2d 5, 9 (Tex. App.-Dallas 1992, no writ); *Adamson v. Blackmar,* 546 S.W.2d 689, 700 (Tex. Civ. App.-Austin 1977, no writ); *Intercity Investments Co. v. Plowman,* 542 S.W.2d 260, 262-63 (Tex. Civ. App-Forth Worth 1976, no writ). Nothin in the record here contradicts the statement that all parties appeared in person or by attorney. Recitals in a judgment may not be contradicted by assertions in an appellant's brief. *McDonald v. Debco Corp. of Texas,* 350 S.W.2d 221, 223 (Tex. Civ. App.-Eastland 1961, no writ). Moreover, Trumbly's counsel wrote the sellers' attorney on August 4, 1992, about a proposed draft of the final order, and in the letter he referred to "our agreement at the premature

hearing held in July," and in which he stipulated that (1) July 23 was the date for performance rather than the day set in the contract, (2) a date for closing had not been set before July 23, 1992, and (3) it was not necessary for the special commissioner to appear at a hearing to report these facts. Thus, it appears that Trumbly had notice of the hearing and the proposed action.

Trumbly also contends that the court erred in setting aside the previous order of specific performance and in reassessing both costs and damages in its final order. He argues that the court should have "clarified" the contract of sale rather than cancelling it and that, as the prevailing party, he was entitled to attorney's fees and costs under Tex. Civ. Prac.. & REM. CODE ANN. % 38.001 (Vernon 1986) and Tex. R. Civ. P. 131. He further argues that the court, in its final order, has essentially reversed itself as to the prevailing party.

Specific performance is an equitable remedy. *Gordin v. Shuler*, 704 S.W.2d 403, 408 (Tex. App.-Dallas 1985, writ ref'd n.r.e). It is ordinarily available only where the complaining party connot be fully compensated by the legal remedy of damages. *Sammons Enterprises, Inc. v. Manley*, (Tex. Civ. App.-Texarkana 1976, writ ref'd n.r.e). When a court of equity requires specific performance, it requires it of both parties. *Loane Star Salt Co. v. Texas Short Line Ry. Co.*, 99 Tex. 434, 90 S.W. 863, 867 (1906). Although primarily a remedy to protect the complaining party, the remedy should be fair to both and require the complaining party as well as the defendant to equitably fulfill their obligations. *See* 67 Tex. Jur. 3d *Specific Performance* % 91 (1989).

When a court orders specific performance, it should set a reasonable time for the parties to fulfill their respective obligations under the contract. *Lockwood v. Frost*, 285 S.W. 847,

878 (Tex. Civ. App.-Texarkana 1926, no writ). Preformance should not be at the option of either party, and an appeals court may refprm a judgment to set a deadline for performance if the judgment does not include a time limit. *See Witte v. Barry*, 16 S.W.2d 548, 550 (Tex. Civ. App.-Waco 1929, writ dism'd).

If a prevailing party in a suit for specific performance fails to perform his obligations under the contract, his right to specific performance is lost as a matter of law. In addition, he will be barred from any future assertion of such right by the principles of res judicata. *Bennett v. Copeland*, 149 Tex. 474, 235S.W.2d 605,608 (1951). As Trumbly failed to perform his obligation under the contract and the interlocutory decree, the court properly rescinded the decree.

Trumbly's damages and attorney's fees were part of the interlocutory judgment. That judgment was expressly conditioned on his performing his obligadons under the sales contract to purchase the property. When he failed to do so, the final judgment reflected the breach of the condition and set aside the interlocutory judgment.

Trumbly notes that in suits founded upon oral or written contracts, and brought under TEX. CIV. PRAC. & REM. CODE ANN. % 38.001 (and its predecessor, TEX. REV. CIV. STAT. ANN. art. 2226), courts have no discretion in awarding attorney's fees to the prevailing party once proof is offered of reasonable fees. *Caldwell and Hurst v. Myers*, 714 S.W.2d 63, 65 (Tex. App.-Houston [14th Dist] 1986, writ ref'd n.r.e.); *Okon v. Levy*, 612 S.W.2d 938, 943 (Tex. App.-Dallas 1981, writ ref'd n.r.e.); *see also In re Smith*, 966 F.2d 973, 978 (5th Cir. 1992). In this case, however, since Trumbly did not meet the conditions imposed by the interlocutory judgment, he was not entitled

to the relief he sought and he was not a pervailing party.

Trumbly also contends that the court's judgment imposed new rights and obligations not contained in the original sales contract. He argues that the court's coder (in its judgment) that trumbly take the property "as is" has rendered the judgment uncertain, since the condition of the property is not specifically described. He asserts that this constitutes fundamental error.

In order for a party to raise a point of error on appeal, tht party must object or except to the trial court's action, so that the matter is brought to the trial court's attention. In addition, the trial court must rule or refuse to rule on the party's request, objection or motion. Tex. R. App. P. 52(a). In the absence of a properly assigned error, a court of appeals may not reverse the trial court's judgment. *Vawter v. Garvey*, 786 S.W.2d 263, 264 (Tex. 1990).

The only objection or motion we find concerning the wording of the judgment is in an unsworn motion to set aside the judgemtn. NOthing in the record indicates that this motion was presented or acted upon by the trial court. A point of error based on a trial court's ruling on a motion must be supported by a record that shows presentment of such motion to and action upon such motion by the trial court. *Ballard v. King*, 652 S.W.2d 767, 769 (Tex. 1983). Trumbly has, therefore, failed to preserve this complaint for appellate review. *See Allright, Inc. v. Pearson*, 735 S.W.2d 240, 240 (Tex. 1987); *Scott v. scruggs*, 836 S.W.2d 278, 283 (Tex. App.-Texarkana 1992, writ denied).

It is true that, if the error is funcamental, no objection is necessary to raise the error on appeal, *see State Farm Mutual*

Automobile Ins. Co. v. Cowley, 468 S.W.2d 353, 354 (Tex. 1971), but fundamental error exista only in those rare instances where the record shows on its face a lack of jurisdiction by the court or that the public intrest, as declared by statute or the constitution of this state, isadversely and directly affected. *Cox v. Johnson*, 638 S.W.2d 867, 868 (Tex. 1982). The use of the words "as is" to decribe the condition of real estate in an order of specific performance does not meet this definition and is not fundamental error.

Additionally, a provision requiring propeny to be delivered or accepted ~as is" is not vague. It refers to the condition of the property on the effective date of the order.

For the reasons stated, the judgment of the trial court is affirmed.

{Signed}
William J. Cornelius
Chief Justice

Date Submitted: October 5, 1993
Date Decided: November2, 1993
Do Not Publish
{Stamped FILED IN
THE COURT OF APPEALS
Sixth District
NOV 2 1993
Texarkana,Texas
By TIBBY THOMAS, CLERK }

Court of Appeals
Sixth District of Texas

JUDGMENT

William Dale Trumbly, Appellant Appeal from the 62nd Judicial District Court of Lamar County, Texas (Tr. Ct. No No. 06-92-00125-CV V. 50968) Opiniondelivered by Chief Justice Cornelius, Justices Bleil and Grant Efs t ao t e participating. Deceased. Et Al, Appellees

BE IT REMEMBERED, that in the above styled and numbered cause, in accordance with the Court's opinion of this date, the Court finds that there was no error in the judgment below. Therefore, it is ORDERED that the judgment of the court below is in all things AFFIRMED. It is further ORDERED that the appellant, William Dale Trumbly, and his surety, David W. Holmes, jointly and severally, pay all costs incurred by reason of this appeal.

RENDERED NOVEMBER 2, 1993
BY ORDER OF THE COURT
WILLIAM J. CORNELIUS
CHIEF JUSTICE

ATTEST: Tibby Thomas, Clerk

NO. 06-92-00125-CV

WILLIAM DALE TRUMBLY, et ux VICKY BELINDA WOOD, APPELLANTS,	)	IN THE COURT OF APPEALS
	)	OF THE STATE OF TEXAS
VS .	)	6TH SUPREME JUDICIAL DISTRICT
MARION R. LAWLER, JR. Individually and As Independent Executor of the ESTATE OF MARION R. LAWLER, SR., ET AL APPELLEE	)	

MOTION FOR REHEARING

TO THE HONORABLE JUDGES OF SAID COURT:

Comes, now CARROLL HARVILL HOLME, substitute counsel for the Appellant, William Trumbly, on behalf of said Appellant and makes this motion for the Court to reconsider their decision in the above numbered cause and in support of said motion would show the Court the following:

I.

That the Appellant prevailed in a trial to a jury on issues concerning breach of contract and specific performance of that contract for sale of land. That judgment nunc pro tunc was entered on August 21, 1991, and is clearly shown to be illegal as it neither reflected in the official minutes of the Court on this appeal, nor does it appear among the docket entries of the record on this appeal. Said judgment became final under mandate of the Court of Appeals on June 8, 1992. Subsequent to

the issuance of mandate, the Trial Court entered an ex part "Final Order" on July 27, 1992 which stripped Appellant of all awards found by the jury and ordered in the final judgment. The Trial Court has been requested to set aside the "Final Order" and conduct a hearing. The Court's decision in this cause has deprived appellant of the damages and attorney fees that were awarded by the jury.

WHEREFORE, PREMISES CONSIDERED, Appellant prays the Court grant this motion and reconsider Appellant s cause.

Respectfully submitted,

Carroll Harvill Holmes

ATTORNEY FOR APPELLANT

537 Southeast Sixth

Paris, Texas 75460

(903) 784-7942

State Bar No 0990~500

CERTIFICATE OF SERVICE

I hereby certifythat a true and correct copyof the above and forgoing Motion for Rehearing was mailed to all counsel of record on this 15th day of November, 1993.

{Signed}

CARROLL HARVILL HOLMES

Court of Appeals
Sixth Distnct
State of Texas

November 30, 1993

Mr. William Trumbly
P. O. Box 1337
Paris, TX 75460

Hon. Carroll Harvill Holmes
Attorney at Law
P. O. Box 37
Paris, TX 75461-0037

Hon. Hardy Moore
Moore, Payne & Clem
310 First National
Bank Building
Paris, TX 75460

Hon. J. Russell Ormesher
Horton, Ormesher & Elliston
2000 Allianz
Financial Center
2323 Bryan Street, LB 130
Dallas, TX 75201

Hon. Pat W. Davis
Bernstein, Davis & Williams
2560 Royal Lane, Suite 217
Dallas, TX 75229

RE: Case No. 06-92-00125-CV
Trial Court No. 50968

Style: Trumbly, William Dale
v. Estate of Mrs. Marion R. Lawler, Deceased, Et Al

Dear Counsel:

The Court entered its order this date in the referenced proceeding whereby Appellant's Motion for Rehearing was OVERRULED.

PLEASE TAKE DUE NOTICE HEREOF.

Respectfully yours,

Tibby Thomas, Clerk

By {Signed Lynda Poore}

Deputy

IN THE SUPREME COURT OF TEXAS

March 9, 1994

NO. 94-0067	)	
	)	
WILLIAM DALE TRUMBLY	)	
ET UX.	)	From LAMAR County,
	)	6th District.
V.	)	
	)	
ESTATE OF MRS. MARION	)	
R. LAWLER, DECEASED	)	
ET AL.	)	

Application of petitioners for writ of error to the Court of Appeals for the Sixth District, together with petltioners' correction to application, filed herein on January 25, 1994, having been duly considered, and the Court having determined that the application, as corrected, presents no error of law wh~ch is of such importance to the jurisprudence of the State as to require correctlon, or reversal of the judgment of the Court of Appeals, it ls ordered that said application, as corrected, be, and hereby is, denied. It is further ordered that applicants, William Dale Trumbly et ux., and surety, David W. Holmes, pay all costs incurred on this application.

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SUPREME COURT OF TEXAS
P. O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

March 9, 1994

Mrs. Carroll Holmes
P. O. Box 37
Paris, TX 75461-0037

Mr. J. Russell Ormesher
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Paris, TX 75460

Mr. Pat W. Davis
Bernstein Davis & Willems
2560 Royal Lane, Suite 217
Dallas, TX 75229

RE: Case No. 94-0067

Style: WILLIAN DALE TRUMBLY ET UX.
v. ESTATE OF MRS. MARION R. LAWLER, DECEASED ET AL.

Dear Counsel:

Today, the Supreme Court of Texas denied the above referenced application for writ of error, as corrected, with the notation, "Writ Denied."

Sincerely,
John T. Adams, Clerk

by (Signed)
Blanca Morin, Deputy

THE STATE OF TEXAS

TO THE 62ND JUDICIAL DISTRICT COURT OF 1 AMAR COUNTY, GREETINGS:

Betore the Court of Appeals for the Sixth Court of Appeals District of Texas. on the 2nd day of November A.D. 1993, the cause upon appeal to revise or reverse your Judgment was determined; and therein our said Court made its order in these words:

William Dale Trumbly, Appellant

No. 06-92-00125-CV v.

Estate of Mrs. Marion R. Lawler, Deceased, Et Al, Appellees

BE IT REMEMBERED, that in the above styled and numbered cause, in accordance with the Court's opinion of this date, the Court finds that there was no error in the judgment below. Therefore, it is ORDERED that the judgment of the court below is in all things AFFIRMED.

It is further ORDERED that the appellant, William Dale Trumbly, and his surety, David W. Holmes, jointly and severally, pay all costs incurred by reason of this appeal.

WHEREFORE, WE COMMAND YOU to observe the order of our said Court in this behalf and in all things to have it duly recognized obeyed and executed WITNESS, the Hon. William J. Cornelius, Chief Justice of our said Court of Appeals, with the seal thereof annexed, at the City of Texarkana, this the 27th day of May A.D 1994.

TIBBY THOMAS, Clerk

By:{Signed Lynda Poore}